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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 175

CONGRESS CONSTRUCTION CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-26a) is reported at 314 F. 2d 527.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1963 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 31, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States is liable for breach of contract where petitioner's construction proposal—acceptance of which by the Navy was expressly contingent upon approval by the Senate and House Armed

Service Committees—was rejected by the Assistant Secretary of Defense and hence never acted upon by the committees.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set out in the Appendix. The statutes so set out are:

Act of September 28, 1951, 65 Stat. 365, 40 U.S.C. (1952 ed.) 551.

National Security Act Amendments of 1949, 63 Stat. 578, 5 U.S.C. (1952 ed.) 171(b), 171a(b), 171a(c)(4) and 171a(f).

Act of July 14, 1952, 66 Stat. 625, 5 U.S.C. (1952 ed.) 171z.

Reorganization Plan No. 6 of 1953, 67 Stat. 638, 5 U.S.C. (1952 ed.) Supp. I, 133z–15.

Act of September 28, 1951, 65 Stat. 365, 12 U.S.C. 1748i.

STATEMENT

In 1952, in response to an invitation circulated by the Department of the Navy, petitioner (through its affiliates [1]) submitted to the Navy a proposal for construction and operation of a 500-unit housing project for military personnel under the Wherry Housing Act [2] (Pet. App. 12a–13a; Fdgs. 5, 6). The proposal contemplated that the government would purchase from petitioner the land for the project and then lease it back to petitioner for the project's construction and

[1] Reference hereafter will be to petitioner, although certain of the activities were conducted by its affiliates.

[2] Title VIII of the National Housing Act, as added by 63 Stat. 570 (see also 64 Stat. 97, 65 Stat. 365, 12 U.S.C. 1701 *et seq.*).

operation (Pet. App. 12a, 13a; Fdgs. 6, 10). Having previously obtained permission from the Department of Defense to negotiate with petitioner, the Navy continued negotiations in early 1953, transmitting to petitioner a Certification of Need to enable it to arrange financing with the Federal Housing Administration (Pet. App. 13a, 16a; Fdgs. 7–10, 13). An accompanying letter noted that the validity of the Certification was expressly dependent upon favorable congressional action for acquisition of the site (Pet. App. 17a; Fdg. 13). On June 18, 1953, petitioner made an offer to sell to the Navy the land proposed as the site of the project (Pet. App. 18a, 19a; Fdg. 16). On June 19, 1953, the Navy acknowledged receipt of the offer and stated (Pet. App. 19a; Fdg. 17):

> This office cannot officially accept your offer nor commit the Navy in any way to such acceptance until the land is approved for acquisition by Congressional Committees and specific authority has been given this office by Bureau of Yards and Docks to enter into such agreements and contracts for land acquisition and site improvements as may be necessary. However, your offer is in substantial agreement with an appraisal made by this office, and it is believed the necessary approvals to enable this office to accept your offer will be forthcoming. The details of your offer were immediately forwarded to the Bureau for promptest action toward obtaining the Congressional approvals.

On the same date petitioner revised its offer, expressly stating that the proposal was subject to ap-

proval of the Bureau of Yards and Docks and the House Armed Services Committee (Pet. App. 19a–20a; Fdgs. 17, 18). On June 26, 1953, petitioner granted Navy an option to purchase the land, an option which was never exercised (Pet. App. 20a; Fdg. 18).

The procedure followed by the Navy in securing approval of projects of the type proposed has varied from time to time (Pet. App. 14a; Fdg. 11), but Section 601 of the Act of September 28, 1951, 65 Stat. 365, 40 U.S.C. (1952 ed.) 551 (App. *infra*, p. 12), provided that the Secretaries of the Army, Navy and Air Force "* * * shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real-estate actions by or for the use of the military departments * * *." After the enactment of this statute, and until February 26, 1953, it was customary for the Navy to submit proposed real estate acquisitions directly to the two Armed Services Committees, without obtaining approval of the Department of Defense (Pet. App. 14a; Fdg. 11). However, by letter dated February 26, 1953, the Chairman of the Senate Armed Services Committee informed the Secretary of Defense that future submittals should contain a paragraph indicating the concurrence of the Secretary of Defense (Pet. App. 15a; Fdg. 12). Upon receipt of this letter, the Navy proceeded to submit to the Secretary of Defense for his approval projects then pending before the committee and, as they were approved, resubmitted them to the committee; subsequent proposals, including petitioner's, were also

presented to the office of the Secretary of Defense for approval (Pet. App. 15a–16a, 21a; Fdgs. 12, 20). On September 4, 1953, the Assistant Secretary of Defense for Properties and Installations formalized the procedure by informing the Assistant Secretary of the Navy that all real estate actions requiring submission to the Armed Services Committees (except certain ones previously approved) had to be forwarded to the Assistant Secretary of Defense for prior clearance (Pet. App. 23a; Fdg. 28).

On July 29, 1953, the Navy requested the Assistant Secretary of Defense for Properties and Installations to approve petitioner's project and its submission to the congressional committees. In view of the pending adjournment of Congress, it submitted the proposal to the congressional committees two days later, advising the Chairman of the Senate Armed Services Committee that the project had been presented to the office of the Secretary of Defense and approval was anticipated shortly (Pet. App. 20a–21a; Fdgs. 19, 20). On August 3, 1953 a subcommittee of the House Armed Services Committee held a hearing on the proposal at which a Navy official testified in support of the project (Pet. App. 21a; Fdg. 21). The subcommittee took no action, however, and held no further hearings (Pet. App. 21a–22a; Fdg. 22). Between August 11, 1953, and April 5, 1954, the Assistant Secretary of Defense considered the proposal in detail and discussed it with the Navy several times, but, despite the Navy's continued urging, refused on January 27, 1954, and again on March 25, 1954, to ap-

prove it because he deemed the cost excessive (Pet. App. 22a–25a; Fdgs. 23–27, 32–34).

Petitioner was not advised that the office of the Secretary of Defense would concern itself with the project until April 1954, although it learned that an Assistant Secretary of Defense traveled to the site in late 1953 or early 1954 (Pet. App. 15a; Fdg. 11). On April 5, 1954, the Navy informed petitioner that the Assistant Secretary of Defense had disapproved the proposed land acquisition and that no further action was contemplated. On April 9, 1954, the Chairman of the two Armed Services Committees were requested to permit withdrawal of the proposal (Pet. App. 25a; Fdg. 34).

Petitioner subsequently filed with the Navy a claim for expenses incurred in negotiating and preparing plans and specifications for the proposed contract. The claim was disallowed (Pet. App. 25a–26a; Fdgs. 36, 37). The present suit, seeking $220,467.04 for those expenses, was filed against the United States on December 21, 1959, in the Court of Claims. In dismissing the petition, the court assumed, *arguendo*, that Navy had impliedly obligated itself to try to secure approval of the congressional committees but concluded that it had fulfilled that obligation by making a determined attempt to persuade the Assistant Secretary of Defense, who had authority to reject the proposal (Pet. App. 5a–10a).

ARGUMENT

The decision of the Court of Claims is plainly correct and is not in conflict with any other decision.

Accordingly, there is no occasion for review by this Court.

1. Petitioner asserts (Pet. 4–5, 6, 12–13) that the Navy entered into a binding contract with petitioner for the construction of a housing project—subject, of course, to the condition precedent of congressional approval. In fact, however, no such contract ever came into being. In its letter of June 19, 1953 (see *supra*, p. 3), the Navy advised petitioner that it could not "officially accept your offer nor commit the Navy in any way to such acceptance" until the land was approved by the Armed Services Committees. In its own revised proposal of the same date, petitioner acknowledged that the proposal was subject to approval of the House Committee and the Navy's Bureau of Yards and Docks. Although the Navy vainly sought permission to accept this offer, that permission was never given; hence the offer was never accepted, and no contract ever arose.

Petitioner maintains, however, that there was at least an implied undertaking by the Navy to present the proposed land acquisition to the congressional committees and to urge its approval (Pet. 5, 6, 13). But, while it was doubtless assumed that the Navy would do its best to obtain the committees' approval, the record does not evidence any binding commitment to do so.

2. Assuming *arguendo*, as did the Court of Claims (Pet. App. 5a), that the Navy incurred an implied obligation to do all in its power to secure the requisite authorization, that obligation was not breached.

Petitioner does not deny that the Navy exerted every reasonable effort to persuade the Assistant Secretary to clear the project; it could do no more. It would be quite fanciful to construe the Navy's implicit agreement, if there was one, as a promise to bypass or ignore its superiors, or to warrant that the approval of its superiors would be forthcoming.

The Secretary of Defense—as well as his delegate, the Assistant Secretary—undeniably possessed authority to review the proposal. The National Security Act Amendments of 1949, 5 U.S.C. 171a(b), 171a(c)(4), 171(a)(f), provided that the three service departments should be separately administered by their respective secretaries "under the direction, authority, and control of the Secretary of Defense," and that the Secretary might perform any function vested in him through such delegates as he might designate. The Secretary of Defense also had specific authority to supervise land acquisitions of the kind involved here. A 1951 addendum to the Wherry Act (65 Stat. 365; 12 U.S.C. 1748(i); Appendix, *infra*, pp. 14–15), authorizing the appropriation of funds for land acquisitions for military housing projects, expressly provided that "[s]uch funds may be expended by the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing." Moreover, the office of Director of Installations—established in 1952 (5 U.S.C. (1952 ed.) 171z; App.

infra, pp. 13–14), to oversee the planning and construction of all military public works projects—was abolished the following year by Reorganization Plan No. 6 (5 U.S.C. (1952 ed.), Supp. I, 133z–15, Sec. 2(b)) and its functions transferred to the Secretary of Defense. Thus, at the time petitioner made its offer, there was substantial legislation on the books indicating that any action taken by the Navy would be subject to supervision by the Secretary of Defense or his delegated representative; and the parties must be deemed to have contracted, if at all, in light of that legislation.

Petitioner appears to argue that intervention by the Defense Department was precluded by the Wherry Act's provision that "the Secretary of the Navy * * * shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives * * *." As the court below pointed out (Pet. App. 6a), however, "when purely executive functions of a discretionary nature are imposed on a subordinate official of the Government it is an implied condition that his actions (before they have become final) are subject to the review and supervision of his superiors—if the superior is authorized to intervene in that particular field and does so in time." Moreover, in his letter of February 26, 1953, the Chairman of the Senate Armed Services Committee requested that future submittals for committee approval of real estate acquisitions contain a paragraph indicating the concurrence of the Secretary of Defense (see *supra*, p. 4). This communication would

appear to make the Secretary's approval a condition precedent to the submission of a proposal to the committee; at the very least, it constitutes a clear recognition of the appropriateness of the Secretary's review of proposed acquisitions.

It being clear, therefore, that the Secretary of Defense was endowed with authority to pass upon petitioner's proposal, there remains only the question whether he had delegated that authority to the Assistant Secretary of Defense for Properties and Installations. The Assistant Secretary was exercising surveillance over land acquisitions at least as early as July 29, 1953 (Pet. App. 20a; Fdg. 19), though it was not until September 4 that he issued a memorandum formally requiring "clearance" of such projects through his office (Pet. App. 23a; Fdg. 28). While the record evidences no formal delegation of authority to the Assistant Secretary prior to the departmental directive of August 13, 1953, it is fair to assume that he was acting with the knowledge and approval of the Secretary. And in any case, the August 13 directive expressly empowered the Assistant Secretary to review the real property requirements of the military departments as to need and to review public works construction programs so as "to assure that they are fully justified as to need in relation to strategic requirements, effective as to intended purpose and economical as to cost, type of building and location" (Pet. App. 33a–34a). To be sure, the directive also required that recommendations of the Assistant Secretary which would change established policies or procedures be signed by the Secretary or Deputy Secretary of De-

fense, and the Assistant Secretary's September 4 memorandum did not bear the Secretary's signature (Pet. 9). But since the Assistant Secretary apparently had been exercising his power of "clearance" even before the issuance of the August 13 directive, the memorandum did not effect a change in established procedures and therefore did not need to be signed by the Secretary. And even if it did, the Assistant Secretary's duty to obtain his superior's signature was a duty owed to the Secretary of Defense and to no one else. The requirement was imposed solely for the protection of the government and was not intended to create enforcible rights in private parties. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126; *Friend* v. *Lee*, 221 F. 2d 96, 100 (C.A.D.C.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963

APPENDIX

The pertinent provisions of the Act of September 28, 1951, 65 Stat. 365, 40 U.S.C. (1952 ed.) 551, were as follows:

> Sec. 601. The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy, * * * shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real-estate actions by or for the use of the military departments or the Federal Civil Defense Administration that are described in (a) through (e) below and in the manner therein described.
>
> (a) Acquisitions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000. In those cases where individual acquisitions are to be made as part of a project, the agreement to be reached shall be based on general plans for the project, which shall include an estimate of the total cost of the lands to be acquired.

* * * * * * *

The pertinent parts of the National Security Act Amendments of 1949, 63 Stat. 578, 5 U.S.C. (1952 ed.) 171(b); 171a(b), 171a(e)(4) and 171a(f) were as follows:

> Sec. 4. Section 201 of the National Security Act of 1947 is amended to read as follows:
>
> * * * * *
>
> "(b) There shall be within the Department of Defense (1) the Department of the Army, the Department of the Navy, and the Department of the Air Force, and each such department shall on and after the date of enactment

of the National Security Acts Amendments of 1949 [August 10, 1949], be military departments in lieu of their prior status as Executive Departments, * * *."

* * * * *

Sec. 5. Section 202 of the National Security Act of 1947, as amended, is further amended to read as follows:

"Sec. 202(a) * * *

"(b) The Secretary of Defense shall be the principal assistant to the President in all matters relating to the Department of Defense. Under the direction of the President, * * * he shall have direction, authority, and control over the Department of Defense.

"(c) * * *

"(4) The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense.

* * * * *

"(f) The Secretary of Defense may, without being relieved of his responsibility therefor, and unless prohibited by some specific provision of this Act or other specific provision of law, perform any function vested in him through or with the aid of such officials or organizational entities of the Department of Defense as he may designate."

* * * * *

The pertinent provision of the Act of July 14, 1952, 66 Stat. 625, 5 U.S.C. (1952 ed.) 171z, was as follows:

Sec. 408. The Secretary of Defense shall maintain direct surveillance over the planning and construction by the military departments of all public works projects. Such surveillance shall be maintained through a civilian

official of the Department of Defense to be known as the Director of Installations, who shall be appointed by and directly responsible to the Secretary of Defense * * *. The Director of Installations shall, from time to time, make such reports directly to the Secretary of Defense with respect to public works projects under construction by the military departments as he may deem necessary to keep the Secretary of Defense currently and fully informed with respect to the status, progress, and cost of, and all other pertinent matters concerning, such public works project. * * *

The pertinent sections of Reorganization Plan No. 6 of 1953, 67 Stat. 638, 5 U.S.C. (1952 ed.) Supp I, 133z–15, are as follows:

SEC. 2. *Abolition of agencies and functions.* (b) The offices of * * * Director of Installations are hereby abolished.

* * * * * *

SEC. 5. *Performance of functions.*—The Secretary of Defense may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Defense of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

* * * * * *

The pertinent part of the Act of September 28, 1951, 65 Stat. 365, 12 U.S.C. 1748i, is as follows:

SEC. 505. There are hereby authorized to be appropriated funds for acquisition of land, installation of outside utilities, and site preparation for housing projects to be constructed under title VIII of the National Housing Act, as amended. Such funds may be expended by

the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing. * * *